

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

REX HARDER, an individual; HERCULES
RANCH LIMITED PARTNERSHIP, a
Washington Limited Partnership; GOLDEN
WEST CATTLE COMPANY, a Washington
Corporation, and HERCULES FARMS,
INC., a Washington Corporation,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-077

ORDER DENYING STAY

Appellants Rex Harder, Hercules Ranch Limited Partnership, Golden West Cattle Company, and Hercules Farms (Harder) are challenging Order to Cease and Desist DE 05 WRE 2296 issued by the Washington Department of Ecology (Ecology), which requires the appellants to discontinue irrigation water diversions from Sprague Lake and Negro Creek for the duration of the 2005 irrigation season. The appellants filed a motion to stay the effectiveness of Ecology's order. Oral argument on the motion was heard by the Board by telephone on July 12, 2005. The Board was comprised of Bill Clarke, chair, William H. Lynch, and David W. Danner. Administrative Appeals Judge, Phyllis K. Macleod, presided for the Board. Counsel Stacy A. Bjordahl represented the appellants and Assistant Attorney General Stephen H. North

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1 represented respondent Ecology. The proceedings were recorded by Randi Hamilton of Gene
2 Barker and Associates, Olympia, Washington.

3 In considering the motion the Board reviewed the following documents:

- 4 1. Appellants' Motion for Stay.
- 5 2. Appellants' Statement of Grounds for Stay.
- 6 3. Declaration of Rex Harder in Support of Motion for Stay with exhibits A-J..
- 7 4. Ecology's Response in Opposition to Motion for Stay.
- 8 5. Declaration of Kevin Brown.

9 Based upon the material submitted, the records and files in the case, and the oral arguments of
10 counsel, the Board enters the following decision.

11 Facts

12 The appellant Rex Harder¹ is the holder of two adjudicated water rights, Surface Water
13 Certificates #45 and #51, and a groundwater certificate #3310-A which may have been changed
14 to a surface water diversion. These rights were recognized in an adjudication of the Cow Creek
15 Drainage in 1986. (Ex. A, Decree Adjudicating Water Rights Pursuant to RCW 90.03.200,
16 *Dep't of Ecology v. Bar U Ranch Co.*, No. 13538.) The rights allow irrigation water to be
17 diverted from Sprague Lake and Negro Creek, which flows into Sprague Lake. Sprague Lake is
18 the source or headwaters for Cow Creek. (Brown Declaration, ¶10) The appellant's rights are
19 junior in priority to stockwater rights to flows in Cow Creek. (Ex A-1, p. 264). Stockwater

21 ¹ References to Rex Harder include the other named appellant entities in which Mr. Harder apparently holds a controlling interest.

1 rights for riparian owners were given senior priority by the referee and final decree in the basin
2 adjudication with an assigned a priority date of 1868. *Id.*

3 In April 2005, Ecology received a complaint from the Washington State Department of
4 Fish and Wildlife claiming that there was no water flowing in Cow Creek. Ecology
5 Environmental Specialist, Kevin Brown, responded by conducting a field investigation with
6 Mitch Wallace on April 13, 2005. (Brown Declaration ¶ 3). On April 13, 2005, Mr. Brown
7 observed several areas of Cow Creek that were either completely dry or where stock flows
8 identified in the report of referee associated with the 1986 adjudication were not being satisfied.
9 On April 13, 2005 a flow of 0.25 cubic feet per second (cfs) was leaving Cow Lake, well below
10 the adjudicated minimum flow of 1.0 cfs. Further measurements on May 23, 2005, and June 30,
11 2005, revealed outflow from Cow Lake of 0.63 cfs and 0.31 cfs respectively. (Brown
12 Declaration ¶ 3).

13 Mr. Harder has expressed the need for approximately six inches of water to irrigate 187
14 acres of land. He does not believe this amount of water is significant and suggests the water
15 level in Sprague Lake will only be reduced by 1.2 inches. (Harder Declaration ¶ 9-10). Mr.
16 Brown indicates 1.2 inches of water removed from the surface of Sprague Lake equates to stream
17 flow of 1 cfs over 95 days or 2 cfs over 47.5 days. (Brown Declaration ¶10).

18 Mr. Brown, who has worked regulating the watershed for a number of years, has no
19 knowledge of any other junior water users diverting from Cow Creek upstream from Cow Lake
20 that could be regulated to satisfy stock flows in the parts of Cow Creek where flows are currently
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1 unmet. (Brown Declaration ¶11.). Ecology, however, is willing to regulate any junior irrigators
2 under the Decree or illegal users that are identified.

3 Regulation of junior irrigators on this stream has been necessary in past years. This year
4 the flows are lower earlier in the year than is typically true. A drought emergency has been
5 declared by the state and limits on exercising junior water rights are occurring earlier than in a
6 normal irrigation year. Mr. Brown indicated stream flows observed in April were similar to
7 conditions that are normally found in late August and September. (Brown Declaration ¶ 4). In
8 keeping with the observed lack of necessary water to meet the senior stockwatering rights,
9 Ecology issued Order to Cease and Desist DE 05 WRE 2296, which terminates Mr. Harder from
10 further diversion of water from Sprague Lake or Negro Creek for the duration of the 2005
11 irrigation season.

12 Mr. Harder has been able to grow and cut one hay crop this year. He will not be able to
13 get a full second cutting or a third cutting if the irrigation water in dispute cannot be applied to
14 his land. The necessary irrigation water would come from Sprague Lake and Negro Creek.
15 (Harder Declaration ¶ 9).

16 Mr. Harder has presented documents addressing the complex nature of the Cow Creek
17 watershed in an attempt to establish that additional water released from Sprague Lake would not
18 increase the water flowing out of Cow Lake. While a number of forces appear to be at work
19 affecting the levels in Cow Creek and Cow Lake, Mr. Harder has not demonstrated that releasing
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1 additional water into Cow Creek from Sprague Lake would be futile.² All of the water released
2 from Sprague Lake may not make it through Cow Lake to the outlet, but some benefit to overall
3 water available for stockwatering can be expected from additional flow. On the record before
4 the Board on this stay motion, the alleged futility of enforcing the adjudicated priorities has not
5 been established.

6 The appellants are seeking a stay of Ecology's Cease and Desist Order DE 05 WRE 2296
7 to allow irrigation during the pendency of this litigation.

8 Analysis

9 The requirements for obtaining a stay from the Pollution Control Hearings Board are outlined in
10 WAC 371-08-415(4) as follows:

11 (4) The requester makes a prima facie case for a stay if the
12 requester demonstrates either a likelihood of success on the
13 merits of the appeal or irreparable harm. Upon such a showing,
the board shall grant the stay unless the agency demonstrates
either:

- 14 (a) A substantial probability of success on the merits; or
15 (b) Likelihood of success and an overriding public interest,
which justifies denial of the stay.

16 See also, RCW 43.21B.320. In this case Mr. Harder has failed to demonstrate either a likelihood
17 of success on the merits of the appeal or irreparable harm if Ecology's order is allowed to stand
18 during the appeal.

20 ² The Board previously refused to apply the futile call doctrine in *Fort et al. v. Ecology*, PCHB Nos. 01-157 & 01-
21 180 (Order Granting Partial Summary Judgment, March 21, 2002). The analysis addressing the argument raised by
the appellants in this case does not mean the Board has accepted that theory as applicable in the State of
Washington.

1 The Adams County Superior Court entered a Decree Adjudicating Water Rights Pursuant
2 to RCW 90.03.200 on December 22, 1986. (Ex. A)(The Decree). The Decree adopted the
3 findings and conclusions of the Report of Referee and Supplemental Report of the Referee in the
4 case and confirmed the water rights contained in the reports. (Ex. A). The referee gave
5 stockwater rights in the Cow Creek drainage senior status:

6 Water requirements for grazing stock on riparian lands in the upper
7 watershed areas and lands remote from Cow Creek should not be negatively
8 impacted by irrigation diversions since very few confirmed irrigation rights
9 exist in these areas, and those represent little consumptive use. Lower
10 watershed areas with a greater number of confirmed irrigation rights and
11 with larger quantities of water being diverted may present a potential for
12 deprivation of water for stock during certain periods of extremely dry years,
13 and provision must be made to mitigate any adverse impact.

14 THEREFORE, in consideration of nondiversionary rights to stock
15 water, flows with a priority date of June 30, 1868, shall be made available
16 in amounts and locations as follows:

17 A. A minimum stockwater flow of 0.50 cubic foot per second in
18 Cow Creek from its intersection with Danekas Road (Old State Highway
19 No. 10) in the SE ¼ Section 14, T. 20N., R. 37 E.W.M. to Hallin Lake in
20 the W ½ SW ¼ Section 15, T. 19 N., R. 37 E.W.M.

21 B. A minimum stockwater flow of 1.0 cubic foot per second in Cow
Creek from the outlet of Cow Lake in Section 20, T. 19 N., R 37 E.W.M., to
its confluence with the Palouse River in Section 27, T. 15 N., R. 37 E.W.M.

 The aforementioned flow levels shall be maintained at all times that
requirements for stock water exist. Whenever the stream flow falls below
the minimums as set forth herein, subordinate classes of right shall be
regulated pursuant to the following paragraph. The setting of these flows is
not meant to require that each identified flow rate be maintained at all times
throughout these reaches of Cow Creek, but only to insure that these
quantities are available at some point on each parcel of riparian land
through which Cow Creek flows. Additionally, grazing stock customarily
having access to springs, ponds, streams, and other sources of water within

1 the Cow Creek watershed shall enjoy a right with a June 30, 1868 priority to
2 all such sources. The measure of that right shall, at a maximum be limited
to the grazing capacity of the land.

3 (Ex. A-1, p. 264-265)(emphasis added).

4 The Report of Referee directed Ecology to administer the water granted under the decree
5 to assure stockwater flows:

6 The Director of the Department of Ecology should, through his
7 administrative staff, regulate the use of the Cow Creek drainage basin
waters on the basis of the stock water flows prescribed herein, Certificates
8 of Adjudicated Water Rights issued under this proceeding, and under
appropriation permits in effect prior to November 6, 1982, and
9 appropriation permits and certificates issued subsequent to November 6,
1981, under the appropriation procedures of Chapter 90.03 RCW. When
10 available water in the Cow Creek drainage basin is insufficient to supply all
classes of rights, regulation of subordinate classes should be effected only
11 when the Director determines that regulation is required in the interests of
satisfying superior class rights. In the event of failure of the supply of water
12 to completely satisfy the total amount awarded in a given class, the amount
remaining for said class shall be apportioned to the appropriators of said
13 class in the proportion which the number of cubic feet per second awarded
to each right bears to the total number of cubic-feet per second awarded
14 such class, subject to use by rotation if agreed upon by the involved parties.

15 Whenever it has been determined that regulation of subordinate classes
of rights is necessary, the Director of the Department of Ecology or his
16 authorized representative shall regulate diversion facilities including
headgates, ditches, pumps and other works, so as to apportion the waters as
17 herein provided, and for that purpose may enter at reasonable times upon
the lands of any and all parties having rights adjudicated herein.

18 (Ex. A-1, p. 265-266).

19 To obtain a stay of Ecology's order in this case, Mr. Harder must show a likelihood of
20 success on the merits or irreparable harm. To show likelihood of success on the merits, the
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1 appellant Harder would have to establish Ecology's cease and desist order was unwarranted
2 under the controlling law. Ecology issued the Order to Cease and Desist in this case based upon
3 a finding that stockwater rights were not being met in the Cow Creek drainage. (Order to Cease
4 and Desist Docket No. DE 05 WRE 2296). Pursuant to the Decree, Ecology is responsible for
5 regulating water users to protect the availability of stockwater in areas downstream from Sprague
6 Lake. Ecology investigated the situation in Cow Creek and Cow Lake and determined that
7 available water was inadequate to meet senior stockwater rights. The low water noted by the
8 investigators was unusual for the late spring and early summer, probably due to the drought
9 conditions being experienced in many parts of Washington this year. Based upon findings and
10 measurements in the field, Ecology directed Mr. Harder to discontinue taking irrigation water
11 from Sprague Lake and Negro Creek. Ecology's actions appear to be consistent with the terms
12 of the Decree and Report of Referee.

13 Likelihood of Success

14 Mr. Harder has advanced several reasons why Ecology's regulatory order should not be
15 upheld. Initially, the appellants challenge the sufficiency of Ecology's finding that senior
16 stockwater rights are not being met. Notably lacking from this argument is any evidence that
17 stockwater rights are being met. The only evidence on the issue was collected by Ecology
18 during its investigation. The water measurements and observations in the field fully support
19 Ecology's finding that insufficient water is present in Cow Creek and at the outflow of Cow
20 Lake to meet stockwater rights.

1 The appellant Harder also argues that Ecology's order is invalid because the Department
2 has failed to regulate other water right holders and illegal users in the Cow Creek drainage. No
3 legal authority has been cited indicating regulation of all other potential users is a prerequisite to
4 enforcement against an admittedly junior right in favor of a senior right. In addition, Ecology's
5 evidence indicated the agency is unaware of any other users diverting from Cow Creek in the
6 relevant area. Ecology has expressed the willingness to enforce against any junior user or illegal
7 user diverting water from Cow Creek, but none has been identified. The facts regarding other
8 water users simply do not support invalidating Ecology's order directed to the appellants Harder.

9 Mr. Harder asserts it would be futile to discontinue irrigation withdrawals from Sprague
10 Lake because the increased flows will never reach the stockwatering areas. Evidence presented
11 demonstrates the hydrology of the area is complex and some of the water in Cow Creek is lost
12 prior to the Cow Lake outflow. (Ex. F). At the same time, evidence indicates some relationship
13 does exist between the volume of water leaving Sprague Lake and water available downstream in
14 stockwatering areas. (Ex. J). The complexities presented by water flows in this area existed
15 when the Decree was entered in 1986. Restrictions on junior irrigators in favor of senior stock
16 water rights were still explicitly included in the adjudication. The Board is not inclined to
17 modify or ignore the terms of the Decree on the basis of the minimal evidentiary record of
18 alleged futility presented in support of this motion.

19 The material before the Board demonstrates Ecology was warranted in issuing a cease
20 and desist order in this case and the appellants' arguments do not establish likelihood of success
21 on the merits.

1 Irreparable Harm

2 A stay can also be issued if the moving party establishes irreparable harm will occur in
3 the absence of a stay. In this case the asserted irreparable harm is the loss of a second and/or
4 third cutting of hay on the appellants' irrigated lands. (Harder Declaration ¶ 9, 12; Ex. G). Mr.
5 Harder cites the Board's decision in *Brethren v. Ecology*, PCHB Nos. 00-080 and 00-082
6 (August 14, 2000) for the proposition that money lost through crop failure is a basis for
7 establishing irreparable harm. The Board is not convinced the *Brethren* case supports a finding
8 of irreparable harm in this case. The *Brethren* decision involved both potential harm to a potato
9 crop and strong likelihood of success on the merits of the case. The harm in *Brethren* did not
10 involve the regulation of junior irrigation rights in favor of senior rights, as this case does. While
11 it is possible certain types of crop-related issues might be properly considered irreparable on the
12 facts of a given case, disappointed expectations or less than optimum yield from the land are
13 types of harm typical to junior irrigation right holders. The Ecology action giving rise to the
14 irreparable harm claimed by Harder is the identical regulatory action taken in previous years.
15 The only difference is that this year the regulatory action is taking place earlier in the irrigation
16 season.

17 In fact, this year, in many areas of the state, junior water right holders will be forced to
18 contend with reduced quantities of available water. The Board acknowledges the hardships
19 resulting from regulation of junior water rights holders so early in the irrigation season.
20 Unfortunately, inability to irrigate, based on lack of adequate water to meet all certificated rights,
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1 is not unique³ and does not demonstrate irreparable harm under the facts of this case.

2 Accordingly, the appellants have failed to establish the second basis for granting a stay of
3 Ecology's order. The Board concludes an inadequate showing has been made to support a stay
4 under the terms of WAC 371-08-415.

5 The Board further concludes Ecology has demonstrated both a likelihood of success on
6 the merits and an overriding public interest justifying denial of the stay. WAC 371-08-415(4)(b).
7 Ecology's regulation of the appellants' irrigation rights in favor of stockwater rights downstream
8 from Sprague Lake is supported by strong evidence showing a likelihood of success on the
9 merits of the case. In addition, Ecology's proper and orderly regulation of water priorities under
10 adjudicated decrees is a significant public interest supporting denial of a stay under these
11 circumstances. Water is particularly scarce this year and enforcement of established legal
12 priorities is vital to maintaining an effective appropriation system.⁴ Accordingly, Ecology has
13 demonstrated grounds under WAC 371-08-415(4)(b) for denying the stay.

14 Based on the foregoing analysis, the Board enters the following
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19 ³"The essence of a water right is the right to deplete the stream in priority." Justice Gregory J. Hobbs, Jr. & Bennett
20 W. Raley, *Water Quality Versus Water Quantity: A Delicate Balance*, *Mineral Rights Institute Proceedings*, §
24.03[1], 24-16 n. 57 (1989).

21 ⁴ "[I]n times of short supply, state water officials have a duty to curtail junior water rights in favor of senior water
rights." Justice Gregory J. Hobbs, Jr., *Priority*, *The Most Misunderstood Stick In The Bundle*, 32 *Envtl. L.* 37, 41
(Winter 2002).

1 ORDER

2 The appellants' Motion for Stay is DENIED.

3 SO ORDERED this 21st day of July 2005.

4 POLLUTION CONTROL HEARINGS BOARD

5 BILL CLARKE, CHAIR

6 WILLIAM H. LYNCH, MEMBER

7 DAVID W. DANNER, MEMBER

8 Phyllis K. Macleod
9 Administrative Appeals Judge